PLEADING

Appealability of a Declaratory Judgment

In the recent case of *Dillon* v. *Gaker*, 57 Ohio App. 90, 25 Ohio L. Abs. 282, 10 Ohio Op. 130 (1937), the plaintiff sought a declaration under the Ohio declaratory judgments statute, Ohio Gen. Code, Sections 12102-1 to 12102-15, as to whether a restriction contained in a deed which was set forth in written contract was enforceable. If said restriction was found to be enforceable, it would determine the right to maintain a mandatory injunction, if a violation of this restriction was attempted. The construction of the written contract is the matter primarily involved. The majoriy of the court held that since the causes set forth had always been cognizable in chancery the case was appealable on both questions of law and fact. The theory behind this opinion being that, as the primary matters of the litigation were cognizable in chancery, it was a chancery case and appealable as such. The majority opinion approves and follows two earlier Ohio appeals cases, *Kochs* v. *Kochs*, 49 Ohio App. 327, 197 N.E. 255 (1935); and *Kresge Co.* v. *B.D.K. Co.*, 52 Ohio App. 101, 3 N.E. (2d) 529, 6 Ohio Op. 236 (1935).

The dissenting judge is of the opinion, "that such a special statutory proceeding, unknown to the chancery courts, can not under any circumstances, regardless of the character of the relief sought, be a chancery case." The dissent is thus based upon the argument that declaratory judgments were not within the jurisdiction of chancery prior to the statute, and therefore as the new remedy was created solely by the statute, it can be appealable only on questions of law for it is not a chancery case within Art. IV, Sec. 6 of the Constitution of Ohio.

The controversy between the majority and dissenting opinions is based on the question whether the character of the relief sought in a given complaint determines the appealability of the statutory declaratory judgment, or, whether such a remedy historically was inherent to equitable jurisprudence. On closer analysis it appears that the character of relief sought in every declaratory judgment proceeding is to "declare the existence of a jural relation, *i.e.* some right, privilege, power or immunity in the plaintiff, or some duty, no-right, liability, or disability in the defendant." Borchard, "The Declaratory Judgment," 28 Yale Law Jour. 1, 5. It is submitted that the solution of the appealability of the statutory declaratory judgment will be found in the answer to the question: Is a declaratory judgment a chancery case?

It is quite generally recognized that there was no jurisdiction either in law or equity to render a merely declaratory judgment without awarding any remedial process prior to the statutes authorizing declaratory judgments. 33 Corpus Jur. 1097. It is true that, incidental to other relief, declarations and constructions could be made by courts of chancery. That, however, is a vastly different jurisdiction than the type of declaratory judgment rendered under the statutory declaratory judgment remedy. Construction of written instruments for the mere information of the parties, disconnected from some executory equitable relief, would not be granted by the chancery courts prior to the statutes. *Bevans* v. *Bevans*, 69 N.J. Eq. 1 (1905). It was the decree in chancery, not the declaration of rights, that was effective in granting relief. Regardless of the clarifying effect of such declaration, it had no value if its principle could not be carried into effect by decree. *Woods* v. *Fuller*, 61 Md. 457 (1884). Such a decree was not within the jurisdiction of chancery. *Chipman* v. *Montgomery*, 63 N.Y. 221 (1875); *Bussy* v. *McKie*, 2 S.C. McCord Eq. 23, 16 Am. Dec. 628 (1827); *Hart* v. *Darter*, 107 Va. 310, 38 S.E. 590 (1907); *In re John*, 30 Ore. 494, 47 Pac. 341 (1896); and Pomeroy, Eq. Jur. 1156.

In England, where one should look to see the true original limitations of equity's jurisprudence, it was said "in equity a declaration of rights was never granted unless there was some relief that could be given." *Baxter* v. *London County Council*, 63 L.T.R. 767 (1890). Lord Brougham in *Earl of Mansfield* v. *Stewart*, 5 Bell 139, 160 (1846), expressed an envy of Scottish jurisprudence that allowed the "beneficial and most admirably contrived form of proceeding called a declaratory action." He lamented that in England there was no analogy. The English view was set forth in *Guaranty Trust Co.* v. *Hannay & Co.*, 2 K.B. 536, 12 A.L.R. 1 (1915), that no right to a declaratory judgment existed, except as incidental to other consequential relief prior to the English declaratory judgment statutes. See Lawrence, Equitable Jurisprudence, p. 988.

"Declaratory judgments were not recognized in Ohio generally until the new Probate Code went into effect," *Wagner* v. *Schrembs*, 44 Ohio App. 44, 184 N.E. 292 (1932). In certain instances equity, in the absence of statute, did render declaratory judgments, *Wiswell* v. *First Cong. Church*, 14 Ohio St. 31 (1862); *Bowen* v. *Bowen*, 38 Ohio St. 426 (1882), but only as incidental to other relief.

In spite of the foregoing conclusion against the equitable jurisdiction over declaratory judgments and while the general rule was as stated by Ross, J., that declaratory judgments were not rendered by chancery

prior to the statutes, nevertheless there have been found sporadic instances where chancery granted a form of declaratory relief not incidental to any corrective relief. Thus in *Greenough* v. *Greenough*, 284 Ill. 416, 120 N.E. 272 (1918), while the court held it lacked jurisdiction to construe a will, it actually made a declaration of the rights of the parties in telling why it would not make the construction requested. In *Bankers Surety Co.* v. *Meyer*, 205 N.Y. 219, 98 N.E. 399 (1912), which is one of the strongest instances of chancery making a declaratory decree, certain notes made by the decedent and which his executor rejected because they were not due, were declared to be valid claims against the estate. This was a true declaratory judgment rendered by chancery in the absence of statute. Another court of chancery construed a will without holding as a prerequisite that there be a trust involved. *Haseltine* v. *Sheperd*, 99 Me. 495, 59 Atl. 1025 (1905).

In certain other classes of cases the relief decreed in some respects resembles declaratory relief. For example, instructions respecting the management of trust estates given to trustees has always been cognizable in chancery. It is believed that in the trust field is found the only generally recognized instance of this power of chancery to declare by its decree. This declaratory right is severely restricted to trusts, which always fell within chancery jurisdiction. *Donohoe* v. *Rogers*, 168 Cal. 700, 144 Pac. 958 (1914); *Porten* v. *Peterson*, 139 Minn. 152, 166 N.W. 183 (1918). In interpleader cases where the conflicting claims to ownership of property or funds in the hands of a stakeholder exist, the proceeding at the instance of the stakeholder is in some respects similar to a declaratory judgment. There the decree declares that the applicant is relieved of all liability. The equitable action for the removal of cloud on title so far as it does not direct cancellation of any instrument or other cloud, is merely a declaration of the plaintiffs title, in effect a declaratory decree. Likewise in regard to boundary disputes, chancery has had jurisdiction from time immemorial to declare the rights of the parties. *Boone* v. *Robinson*, 151 Ky. 715, 152 S.W. 753 (1913); and *Krause* v. *Note*, 217 Ill. 298, 75 N.E. 362 (1905).

While the foregoing instances afford some authority for the contention that an inherent equitable jurisdiction to render declaratory judgments existed prior to the statutes, it is submitted that, except in the cases of the trusts and the bills to remove cloud on title, the instances are spasmodic and desultory and do not afford a sufficient basis for the general conclusion that declaratory judgments were cognizable in chancery.

The very fact that legislation was thought to be necessary to create

this remedy shows that due to the lack of remedy both at common law and chancery, and due to the great demand for such a remedy, the statutes were enacted. In the case of *In re Ungaro*, 88 N.J. Eq. 25, 102 Atl. 244 (1917), the court of chancery admitted it would have been unable to construe wills and other written instruments prior to the statute but that now such a declaratory remedy was available.

In the principal case the dissenting opinion is apparently well supported by authority in its position that the declaratory judgment was purely a creature of statute and not within the inherent jurisdiction of chancery. It is well settled in Ohio that the question of the appealability of a case depends upon whether the basic principle of the statute is equitable in character and based upon some equitable doctrine. *Harper & Kirschten Shoe Co.* v. *The S. & B. Shoe Co.*, 16 Ohio App. 387 (1922). Clearly the basic principle and character of the declaratory judgment statute is not equitable. Therefore the declaratory judgment is not a chancery case and can not be appealed on both questions of law and fact.

To have the appellate review of the declaratory judgment on law alone will in no manner harm the effectiveness of the declaratory judgment remedy or do violence to any sound principle of policy. On the contrary it will better serve the declaratory judgment, the aim of which is speed and simplicity in securing the relief sought, by avoiding a trial *de novo* on appeal thus securing greater dispatch in the final disposition of the litigation.

KARL RUEDIGER

REAL PROPERTY

LAND TRUST CERTIFICATES

The testatrix, Frances Helen Rawson, transferred personal property to a trustee. With her consent and approval, a part of the income was invested in certain "land trust" certificates. At her death, these formed a part of the estate and the question was whether they passeed by the will to the devisees of the real estate or to the legatees of the personal property. The court, construing the will and declaring the rights of certain beneficiaries, held the certificates passed as real estate to the devisees named in the will. The judgment was affirmed by the Court of Appeals. *The First Natl. Bank, Exr.*, v. *Davis*, 56 Ohio App. 388, 9 Ohio Op. 443 (1937).

Land trust certificates are a comparatively recent development of